IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-6912

EDGAR GILBERT MILLER, Petitioner,

V.

COMMONWEALTH OF KENTUCKY, Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

J. VINCENT APRILE II
ASSISTANT DEPUTY PUBLIC DEFENDER
STATE OFFICE BUILDING ANNEX
THIRD FLOOR
FRANKFORT, KENTUCKY 40601

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COUNSEL FOR PETITIONER

June 9, 1978

OF COUNSEL: M. Gail Robinson
M. GAIL ROBINSON
ASSISTANT PUBLIC DEFENDER

INDEX

TABLE OF CASES, STATUTES
AND AUTHORITIES CITED

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

The petitioner, Edgar Gilbert Miller, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kentucky entered on March 14, 1978.

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky affirming petitioner's conviction for first degree robbery and reversing his conviction for first degree assault[1] was filed on January 31, 1978 and is not reported. The order of the Supreme Court of Kentucky denying a rehearing was entered on March 14, 1978. The mandate was entered by the Supreme Court on March 14, 1978. Copies of the above-mentioned opinion, order and mandate are attached hereto.

[1] The Kentucky Supreme Court reversed petitioner's assault conviction because it violated KRS 505.020 which prohibits multiple prosecutions for the same offense.

JURISDICTION

The opinion of the Supreme Court of Kentucky was entered on January 31, 1978. Petitioner's timely petition for rehearing was denied on March 14, 1978. The mandate of the Supreme Court of Kentucky was issued in petitioner's case on March 14, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I.

WHETHER PETITIONER WAS UNCONSTITUTIONALLY DEPRIVED OF HIS RIGHT TO DUE PROCESS OF LAW BY THE REFUSAL OF THE TRIAL COURT TO GIVE AN INSTRUCTION ON THE PRESUMPTION OF INNOCENCE - REASONABLE DOUBT STANDARD OF PROOF?

II.

WHETHER THIS COURT'S RECENT DECISION OF TAYLOR V. KENTUCKY SHOULD BE APPLIED TO PETITIONER?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the 6th and 14th Amendments to the Federal Constitution.

STATEMENT OF THE CASE

Petitioner was indicted on December 14, 1976 for first degree robbery and first degree assault (Transcript of Record, hereinafter T.R., pp. 2-3). According to the indictment, petitioner on or about December 9, 1976 used physical force on Mona Miller in the course of committing a theft and intentionally caused serious physical injury to Ms. Miller by means of a pistol (T.R., pp. 2-3).

On April 19, 1977, appellant's trial counsel, Mr. Raines, filed a written motion for a continuance (T.R., p. 30). He attached an affidavit explaining why he needed that continuance (T.R., p. 31). Prior to the voir dire Mr. Raines explained in detail why he needed more time - basically because he needed to find alibi witnesses (Transcript of Evidence, hereinafter T.E., pp. 4-9). After the prosecutor noted that alibi witnesses were not necessary, the judge overruled petitioner's motion because "these cases do have

to be moved along" (T.E., p. 9).

Mr. Raines then moved to dismiss the assault indictment on the basis that Kentucky Revised Statutes 505.020 prohibited the prosecution of petitioner for robbery and assault for the same incident (T.E., pp. 14-16). The judge overruled his motion (T.E., p. 18).

The prosecutor called Mona Miller as a witness and she testified that on December 9, 1976, a man accosted her at work and beat her with a gun while telling her to get the money (T.E., pp. 75-78). Ms. Miller removed some stamps and cash from a safe and gave them to the man (T.E., pp. 79-80). She identified petitioner as her assailant and said she recognized him because he had been in the union office before (T.E., pp. 72-73, 80-81).

The prosecution's other evidence consisted of testimony that petitioner was not home when the police searched for him and left a message with his wife (T.E., pp. 123-124, 129), that petitioner was extradited from California (T.E., p. 150), and that petitioner allegedly told Detective Darrell Moody that he was at the union office on December 9 (T.E., p. 146).

Petitioner testified in his own behalf. He explained that he was in Nashville looking for jobs on December 9. He related that when he was in the parking lot of the Holiday Inn he saw a woman who said she was late for a fashion show and convention at the Holiday Inn (T.E., p. 171). Petitioner absolutely denied assaulting or robbing Mona Miller (T.E., p. 180).

On cross-examination, the prosecutor asked petitioner if anyone saw him in Nashville that day, and when petitioner said "yes" the prosecutor asked whether they would be at the trial (T.E., p. 191). The prosecutor asked the same question later during cross (T.E., p. 204).

The prosecutor was also permitted, over strenuous defense objection, to inquire into four prior felony convictions of petitioner's all of which were <u>at least</u> twelve years old (T.E., pp. 182-184). Petitioner had no other witnesses to testify for him.

Petitioner tendered an instruction on presumption of innocence - reasonable doubt that was rejected by the court (T.R., p. 34). After the court instructed the jury and the trial attorney gave his closing argument, the prosecutor made his argument where he hammered home that petitioner had no witnesses to back up his account of his whereabouts on December 9, 1976 (T.E., pp. 223, 225). The prosecutor also emphasized petitioner's prior felony convictions in his summation (T.E., pp. 225-226).

Petitioner was found guilty of first degree robbery and first degree assault and sentenced to twenty years in prison for each offense (T.R., pp. 33, 37, 42, 44).

REASONS FOR GRANTING THE WRIT

I.

THIS COURT HAS RECENTLY DECIDED A CASE ON THE NECESSITY FOR A PRESUMPTION OF INNOCENCE - REASONABLE DOUBT INSTRUCTION AND THIS CASE PRESENTS THE SAME ISSUE.

On May 30, 1978, this Court decided the case of Taylor v. Kentucky, ____U.S. ____ (No. 77-5549; decided May 30, 1978). The issue before this Court in that case was whether the petitioner was entitled as a matter of due process of law to an instruction on the presumption of innocence - reasonable doubt standard of proof. Id., Slip Opinion, hereinafter S.O., at 1.

This Court observed that petitioner's trial was essentially a swearing contest between victim and accused. Id., S.O. at 2, 10. This Court also emphasized that the trial court's instructions were "rather Spartan" and that the court's "truncated discussion of reasonable doubt. . .was hardly a model of clarity." Id., S.O. at 4, 10. Analyzing particular aspects of Taylor's trial - the prosecutor's references to the indictment and warrant and his linking Taylor to other defendants who are now in the penitentiary - this Court held that there was "a genuine danger that the jury would convict petitioner on the basis of those extraneous considerations, rather than on the evidence introduced at trial." Id., S.O. at 9-10.

Like Taylor's trial, petitioner's trial was essentially

a swearing contest between petitioner and the alleged victim. Other than the instructions on the elements of first degree robbery and first degree assault, the judge's instructions at petitioner's trial were identical to those given at Taylor's. The judge instructed the jurors thus on reasonable doubt:

> The term "reasonable doubt" as used in these instructions means a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proved, but whether, after hearing all the evidence, you actually doubt that the defendant is guilty (T.R., p. 33).

Significantly, this is the instruction included in Palmore 1 Kentucky Instructions To Juries, § 11.01 which is co-authored by Chief Justice Palmore of the Supreme Court of Kentucky. It is the standard Kentucky reasonable doubt instruction which has been approved by Kentucky's highest court. Merritt v. Commonwealth, Ky., 386 S.W.2d 727, 729 (1965).

Petitioner's trial counsel objected to the trial court's instruction on reasonable doubt and tendered an instruction on presumption of innocence - reasonable doubt (T.E., pp. 213-214; T.R., p. 34). His instruction read:

> You are instructed that the Defendant, Edgar Gilbert Miller, is presumed to be innocent until the contrary is proved beyond a reasonable doubt. This presumption carries the force of law and can only be controverted by evidence which leaves the mind of each juror in that condition that he can say that he feels an abiding conviction, to a moral certainty, that the Defendant is guilty of each element of the offense charged.
>
> You are further instructed that this standard of reasonable doubt applies to each element of the offense charged; therefore, you must acquit the Defendant, Edgar Gilbert Miller, unless you find beyond a reasonable doubt that the evidence actually introduced proves each element of the offense with which he is charged.
>
> A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is always upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution.

> The law never imposes upon a defendant in a criminal case the burden or duty of producing any evidence (T.R., p. 34).

The trial court refused to give petitioner's instruction.

Petitioner asserts that an instruction on presumption of innocence - reasonable doubt was essential to providing him with due process of law. It was even more important at his trial than at Michael Taylor's.

At petitioner's trial the Commonwealth, over strenuous defense objection, asked petitioner on cross-examination about four prior felony convictions - 2 counts of armed robbery in 1954, forgery in 1960, burglary in 1964 and 3 counts of armed robbery in 1965 (T.E., p. 14). Defense counsel argued at a hearing on the question that the convictions were "too remote in light of the prejudice which they are bound to incur with regard to the jury" (T.E., p. 14). The judge ruled, however, that the convictions were admissible, and the prosecutor asked petitioner on cross-examination about the specific offenses he had committed (T.E., pp. 14, 182-184).

The prosecutor emphasized petitioner's prior record in his closing argument. He said:

> Bear in mind those prior felonies that Mr. Raines talked about. They only go to whether or not he's telling the truth, and for you to consider those, as the judge said, only on the issue of whether or not he has told the truth in the courtroom today, and I say to you that seven different counts of armed robbery, one count of forgery, and one count of burglary in a man's past, that tells me that this man is not telling you the truth, and I don't believe that you can believe a word of his testimony, and that is about what that type of evidence can be introduced for (T.E., pp. 225-226).

Significantly, the prosecutor attributed seven counts of armed robbery to petitioner when in fact he had been convicted of only five counts. Of course, armed robbery was the offense for which petitioner was on trial once again.

The prosecutor also reiterated the judge's brief reasonable doubt instruction and even twisted it to make it more unfavorable to petitioner:

> [A]and I say to you that that [sic] reasonable doubt is defined in those instructions, and that is the definition that you're supposed to look at and if you will look at it, it's No. 3, and it says that reasonable doubt is a real doubt, it's a substantial doubt, and you're not to ask yourself whether or not a better case might have been proved, but whether, after you hear all the evidence, that you will actually doubt the defendant is guilty.
>
> Nothing is entirely free of doubt. Nothing is without doubt. There's some doubt about everything. Nothing is doubt-free. We're not asking you for any doubt. You have to find that there's a real, substantial doubt in your mind, and ladies and gentlemen, after Mrs. Miller's testimony, and after the testimony of this defendant, I don't see how there can be any reasonable doubt (T.E., p. 227).

The prosecutor was informing the jurors that they had to have "a real, substantial doubt" to acquit petitioner! What a perversion of the Commonwealth's burden!

Under the circumstances of petitioner's case, "the purging effect of an instruction on the presumption of innocence was essential to a fair trial." Id., S.O. at 8. The presumption of innocence was mentioned only once - in defense counsel's voir dire (T.E., pp. 36-37). The trial was a swearing contest between petitioner and the alleged victim. Petitioner was cast as a habitual violator of the law by his admission on cross-examination to four previous felony convictions, two of which were for the same crime for which he was being tried. In closing argument the prosecutor emphasized petitioner's long record and informed the jurors they had to have "a real, substantial doubt" to acquit petitioner. Furthermore, the judge gave the same sketchy and much-criticized instruction on reasonable doubt that the judge gave in Taylor's case.

On appeal petitioner urged that "the trial court deprived him of due process by refusing to give the defense-tendered instruction on the presumption of innocence and the meaning of reasonable doubt" (Petitioner's Brief For Appellant, pp. 19-22). He cited Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126 (1976) and various other cases. The state responded that the reasonable doubt instruction given by the court was proper and cited Palmore's Instructions, supra,

and Merritt v. Commonwealth, supra (Brief for Appellee, pp. 12-13).

Kentucky's Supreme Court described this assignment of error (and six others) as "patently without merit" and cited Merritt v. Commonwealth, id., and Taylor v. Commonwealth, Ky. App., 551 S.W.2d 813 (1976), disc. rev. denied June 29, 1977, rev'd sub nom. Taylor v. Kentucky, supra. Petitioner requested a rehearing of his case solely on the ground the Kentucky Supreme Court had misconceived the law on the presumption of innocence issue (Petitioner's Petition For Rehearing). The state responded that petitioner "strenuously argued" the issue in oral argument and that Kentucky's highest court advised that it did not intend to "change its mind" on the need for such an instruction until this Court decided the matter (Response to Petitioner's Petition For Rehearing). The Supreme Court of Kentucky denied the petition without comment.

This issue is now properly before this Court. Petitioner respectfully requests that this Court grant review of it.

II.

THIS COURT SHOULD APPLY THE RULE OF LAW ANNOUNCED IN TAYLOR V. KENTUCKY TO PETITIONER.

Petitioner asserts that the rule of law announced in Taylor v. Kentucky, supra, clearly should apply to his case. Petitioner emphasizes that in Taylor this Court merely applied the principles announced in Estelle v. Williams, supra. As this Court observed in Taylor, "Estelle v. Williams quite clearly relates the concept of presumption of innocence to the cognate requirements of finding guilt only on the basis of the evidence and beyond a reasonable doubt, 425 U.S. at 503." Taylor v. Kentucky, supra, S.O. at 8 n. 13. This Court then emphasized that as long ago as 1895, the decision in Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481 (1895), supported the conclusion that an instruction on the presumption of innocence - reasonable doubt standard of proof "is an element of Fourteenth Amendment due process. . . ." Taylor v. Kentucky, supra, S.O. at 8 n. 13. Coffin v. United States, supra, supported that proposition. Estelle v. Williams, supra, made it absolutely clear.

Even assuming arguendo that this Court should hold that the decision in Taylor v. Kentucky, supra, established "new law," that decision would indisputably be applicable to petitioner whose conviction was not final at the time of the decision. The major purpose of the decision in Taylor v. Kentucky, supra, is "to overcome an aspect of the criminal trial that substantially impairs its truth - finding function. . . ." Ivan v. City of New York, 407 U.S. 203, 204, 92 S.Ct. 1951, 32 L.Ed.2d 659, 661 (1972). The purpose of requiring a presumption of innocence instruction is to purge the jurors' minds of any beliefs they might hold that the defendant may be guilty because he was indicted or did not testify or had a prior record or some other extraneous matter. Taylor v. Kentucky, supra. "[O]ne accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial. . . ." Id., S.O. at 7. The presumption of innocence instruction is one important way of impressing upon the jury the importance of that right. Id.

The principle that a defendant is presumed innocent is closely related to the prosecutor's burden of proving guilt beyond a reasonable doubt. Id., S.O. at 5-7. This Court has decided in recent years two landmark cases on the prosecutor's burden of proof. In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). Both decisions have been declared fully retroactive. Ivan v. City of New York, supra (Winship); Hankerson v. North Carolina, ___U.S. ___, 97 S.Ct. 2339, 53 L.Ed. 2d 306 (1977) (Mullaney). Surely then Taylor v. Kentucky, supra, must at least be applicable to defendants whose convictions were not yet final at the time Taylor was decided.

In deciding that Winship and Mullaney are fully retroactive, this Court emphasized that the reasonable doubt standard those cases effectuated "provides concrete substance for the presumption of innocence - that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law'". . . . Ivan v. City of New York, supra, 407 U.S. at 204; Hankerson v.

North Carolina, supra, 97 S.Ct. at 2344. So does the instruction on presumption of innocence endorsed as essential in Taylor v. Kentucky, supra.

Since this Court in Taylor v. Kentucky, id., merely applied the clear principles of Estelle v. Williams, supra, and its precursors and progeny, the decision applies to petitioner. Even assuming arguendo that this Court holds that Taylor announced "new law," the decision applies to petitioner whose conviction was not final at the time of the decision. Ivan v. City of New York, supra; Hankerson v. North Carolina, supra. See Roberts v. Russell, 392 U.S. 293, 88 S.Ct. 1921, 20 L.Ed.2d 1100 (1968); Linkletter v. Walker, 381 U.S. 601, 607, 85 S.Ct. 1731, 14 L.Ed. 2d 601 (1965).

Petitioner respectfully submits that this Court should grant review of his conviction in light of Taylor v. Kentucky, supra.

CONCLUSION

For the reasons detailed above, this Court should grant this petition for a writ of certiorari to review the judgment and opinion of the Supreme Court of Kentucky.

Respectfully submitted,

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OF COUNSEL: M. GAIL ROBINSON
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RENDERED:
January 31, 1978

SUPREME COURT OF KENTUCKY
SC-410-MR

EDGAR GILBERT MILLER — APPELLANT

V.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE J. DAVID FRANCIS, JUDGE
No. 17191
No. 17192

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION PER CURIAM

AFFIRMING IN PART
REVERSING IN PART

Miller was convicted of first-degree robbery, KRS 515.020 (1), and first-degree assault, 508.010 (1) (a). His punishment was fixed at imprisonment for 20 years for each conviction. He was sentenced to imprisonment for a maximum of 20 years. He appeals and assigns eight errors.

On December 9, 1976 Miller forced a union official to open its safe and deliver money to him by beating her about the head and hands with a pistol. Thereafter and in order to accomplish his escape, he struck her at the base of the skull with the pistol. No further trauma was administered to the hands.

The instructions on first-degree robbery required the jury to believe that the theft was accomplished either by beating the official about the head and hands or while armed with a deadly weapon. The verdict does not disclose whether the jury believed one or both alternatives.

The instructions on first-degree assault required the jury to believe that the official was beaten on the hands. The verdict discloses that the jury believed this.

Miller submits that he should not have been convicted of the first-degree assault charged because the beating upon which it was founded may not be eliminated as an essential element of the first-degree robbery charge. KRS 505.020. We agree. Sherley v. Commonwealth, Ky., _____S.W. 2d_____(decided November 18, 1977).

The other seven assignments of error are patently without merit and need not be discussed in detail. It is enough to refer counsel to: Taylor v. Commonwealth, Ky., 545 S.W. 2d 76 (1976); Owens v. Commonwealth, Ky., _____S.W.2d_____(decided December 13, 1977); Bogie v. Commonwealth, Ky., 467 S.W. 2d 767 (1971); Taylor v. Commonwealth, Ky. App., 551 S.W. 2d 813 (Discretionary Review Denied June 29, 1977, Cert. Granted November 28, 1977); Merritt v. Commonwealth, Ky., 386 S.W. 2d 727 (1965); Wells v. Commonwealth, Ky.,_____S.W. 2d_____ (decided January 10, 1978); Davis v. Bennett's Adm'r., 279 Ky. 799, 132 S.W. 2d 334 (1939); Alcorn v. Commonwealth, Ky., 557 S.W. 2d 624 (1977).

The judgment of conviction of the charge of first-degree assault is reversed and the cause is remanded with directions to dismiss that charge. In all other respects the judgment is affirmed.

All concur.

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COMMONWEALTH OF KENTUCKY

Supreme Court of Kentucky

MANDATE

EDGAR GILBERT MILLER

VS.

File No. SC-410-MR
Opinion Rendered January 31, 1978
Appeal From Warren
Circuit Court Action No. Ind. #17191 #17192

COMMONWEALTH OF KENTUCKY

The Court being sufficiently advised, delivered herein an opinion per curiam, and it seems to them the judgment herein is erroneous, in part.

It is therefore considered that the judgment be affirmed in part and reversed in part with directions to correct the judgment in conformity with the views expressed in the opinion herein; which is ordered to be certified to said court.

March 14, 1978 Appellant's Petition for Rehearing Denied.

POSTED
3/15/78

A Copy - Attest

Issued March 14, 1978

MARTHA LAYNE COLLINS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-6912

EDGAR GILBERT MILLER PETITIONER

V.

COMMONWEALTH OF KENTUCKY RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

RESPONDENT'S MEMORANDUM IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

EDGAR GILBERT MILLER — PETITIONER

V. — ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

COMMONWEALTH OF KENTUCKY — RESPONDENT

RESPONDENT'S MEMORANDUM IN OPPOSITION

MAY IT PLEASE THE COURT:

OPINIONS BELOW

As set out in petitioner's Petition and attached thereto.

JURISDICTION

Jurisdictional requisites are set forth in the Petition.

QUESTIONS PRESENTED

I.

WHETHER UNDER THE FACTS OF THIS CASE PETITIONER WAS ENTITLED TO AN INSTRUCTION AT TRIAL ON THE PRESUMPTION OF INNOCENCE.

II.

WHETHER TAYLOR V. KENTUCKY (No. 77-5549, DECIDED MAY 30, 1978) SHOULD BE APPLIED RETROACTIVELY SO AS TO AFFECT THIS CASE.

CONSTITUTIONAL ISSUES INVOLVED (ASSERTED)

The Constitutional issues asserted by petitioner are the Sixth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT

Petitioner was tried and convicted of First Degree Robbery (Kentucky Revised States, hereinafter KRS), (KRS 515.020(1)), and First Degree Assault (KRS 508.010(1)(a)) and sentenced to twenty (20) years imprisonment on each charge to be served concurrently, in the Warren (Bowling Green) Circuit Court. On appeal to the Kentucky Supreme Court, the conviction of First Degree Robbery was affirmed and the conviction of First Degree Assault was reversed on the ground that all of the elements of assault were merged into the elements of First Degree Robbery in accordance with the Kentucky Supreme Court's previous opinion in Sherley v. Commonwealth, Ky., 558 S.W.2d 615 (1977). Petitioner, at trial and on appeal, asserted as one of eight grounds for reversal that he was entitled to an offered instruction of presumption of innocence. This issue was decided adversely to petitioner's assertion without comment, the Kentucky Supreme Court citing Taylor v. Commonwealth, Ky.App., 551 S.W.2d 813; Discretionary Review denied June 29, 1977, Cert. granted November 28, 1977).

At trial, an extensive voir dire was conducted in which defense counsel queried the prospective jurors on the presumption of innocence (TE 35-37, Appendix A). Counsel also discussed the concept in his opening statement (TE 165-166, Appendix B) and in closing argument (TE 214-219, Appendix C).

Mona Miller (no relation to petitioner) testified (TE 70-115, Appendix D), that she was a secretary for the Sheet Metal Workers and did all the union's office work and that petitioner came into her office on December 6, 1976 while she was washing the coffee pot in a bathroom. Sensing someone behind her, she turned and saw petitioner with a gun pointing at her stomach. He was wearing a hat, expensive looking sunglasses, a little Hitler-type mustache and had on a tan coat. The mustache appeared to be false. She screamed and he began to beat her with the gun about her head and hands. He required her to open the safe to give him a money bag containing money and checks. She recognized him instantly as a man who had come into the union office on two previous occasions.

She remembered him because he had the same surname as hers and lived on the same rural route number, he filled out an application form on one of those occasions, and she had followed him on the one previous occasion, behind his Cadillac, which contained a bumper sticker which made uncomplimentary statements about someone's wife. Mrs. Miller's beating resulted in her hospitalization for ten days. Introduced were her wedding band which contained a dent in it and her watch. Mrs. Miller's husband testified to her condition when he arrived after being called. A police officer testified as to her condition when he arrived. Petitioner testified he went to Nashville, Tennessee that day and did not return until after dark, about 6 P.M. Mike Caudill, however, testified he was in Caudill's store both in the morning between 8 - 9 A.M. and again between 4 - 5 P.M. In the morning, petitioner purchased items on credit but paid Caudill back that afternoon. Ten witnesses testified for the prosecution. Petitioner was the only defense witness.

ARGUMENT

I.

THE DECISION IN TAYLOR V. KENTUCKY (77-5549, DECIDED MAY 30, 1978) DOES NOT AUTHORIZE UNDER THE FACTS OF THIS CASE THE GRANTING OF A WRIT OF CERTIORARI.

Petitioner contends that Taylor v. Kentucky, supra, mandates the granting of a writ of certiorari because the trial court refused to give his proffered instruction on the presumption of innocence and thus such failure violated his right to due process of law under the Fourteenth Amendment to the Constitution of the United States.

Respondent submits that certiorari should be denied and that

Taylor is not dispositive of the issue in this case.

In Taylor, only two witnesses testified -- the prosecuting witness and the defendant. The result was, in effect, a swearing contest as to who was telling the truth. Here, although the only witnesses to see the robbery were the victim and petitioner (although he denied his participation), there was other corroborating evidence. The victim's husband described her beaten condition. So did the police officer. The victim's ring was damaged in the beating of her hands by the petitioner with his pistol. The victim was hospitalized ten days with serious injuries. Another witness testified that he saw petitioner in his store at 4 P.M. on the day petitioner testified he did not get back from Nashville until after dark, after the news came on at 6 P.M. Another witness, a police officer, found blood over the bathroom floor and commode. Another witness testified he took petitioner to Nashville on the date of the robbery but not until that night -- after the robbery. An expert witness testified that the signature card filled out by petitioner on his previous appearance in the union office was, in fact, petitioner's signature.

So, the proof in this case is not that of a swearing contest between only two opposing witnesses, but a mass of evidence which corroborates the description of petitioner as the robber and nullifies his alibi defense.

As we read and understand Taylor, this Court stated in its majority opinion (Slip Opinion, p. 12):

> "We hold that on the facts of this case the trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment." (Emphasis supplied)

Mr. Justice Brennan in his concurring opinion in Taylor

believed that trial judges in all criminal cases should give the presumption of innocence instruction where it is requested, and Mr. Justice Stevens in his dissenting opinion observed that:

> "In some cases the omission [to give the offered instruction] may be fatal, but the Court wisely avoids a holding that this is always so." (Slip Opinion, dissent p. 2) (Emphasis supplied)

Respondent submits that this is one of the cases in which Taylor should not apply.

Whereas, in Taylor, this Court faulted the prosecutor's inferences of guilt from "facts" not in evidence, no similar situation appears in this case.

In Taylor, only two witnesses testified and the evidence was not so substantial as to guilt. On that basis, this Court believed that the requested instruction as to presumption of innocence was an added safeguard for the preservation of due process.

Here, there is an abundance of evidence of guilt. More than ten prosecution witnesses testified. There was corroborative evidence to support the primary prosecution witness' testimony. The giving or failing to give the instruction would not have changed the course of the trial and the resultant jury verdict. And, this case arose before this Court's decision in Taylor.

II.

TAYLOR V. KENTUCKY SHOULD NOT BE GIVEN RETROACTIVE APPLICATION.

The respondent submits that Taylor v. Kentucky, supra, should not be given retroactive effect to this case which was decided before Taylor. In fact, Taylor is not totally prospective in application because it is limited to cases of similar fact situations.

A new rule should not be given retroactive application if its effect will impose an undue burden on the administration of justice. Linkletter v. Walker (1965), 381 U.S. 618, 14 L.Ed.2d 601, 85 S.Ct. 1731, nor should it be applied if it will have a grave effect on several states which had in reliance on earlier decisions been following a contrary rule. This Court held in Tehan v. United States (1966) 383 U.S. 406, 15 L.Ed.2d 453, 86 S.Ct. 459, rehearing denied 383 U.S. 931, 15 L.Ed.2d 850, 86 S.Ct. 925 that the rule prohibiting comments on an accused's failure to testify was not entitled to retroactive effect.

Kentucky has for more than fifty years (Mink v. Commonwealth, 228 Ky. 674, 15 S.W.2d 463 (1926)), determined that it was unnecessary for the trial judge to instruct on the presumption of innocence. Undoubtedly, many other states have adopted a similar rule. To apply the rule announced in Taylor retroactively to all those states and cases in which Taylor could be applicable would impose an undue burden on the administration of justice in those states which had relied on a rule which was followed for an extensive number of years. And, to require retroactive application from the fountainhead of a case which in itself is not totally prospective is to apply such application inconsistently.

Thus, it is submitted that because the facts in this case are unlike those in Taylor, Taylor should not apply, and the rule announced in Taylor should only be applied prospectively to those cases tried after Taylor was decided.

CONCLUSION

For the aforesaid stated reasons, respondent submits that the Court should deny certiorari in this case.

Respectfully submitted,

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